Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

CHARLES ROY RAMBO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Can the criminal actions of a third party reduce the legitimate expectation of privacy of Charles Roy Rambo for purposes of determining the reasonableness of the search and seizure of the black canvas bag?

2. Whether 18 U.S.C. § 922(o) constitutes a proper exercise of the authority granted to Congress under the Commerce Clause in light of *United States v. Lopez*, 115 S.Ct. 1624 (1995)?

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COMES NOW the Petitioner, Charles Roy Rambo, and respectfully requests that the Supreme Court of the United States issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Ninth Circuit.

REPORT OF OPINIONS BELOW

On January 25, 1996, the United States Court of Appeals for the Ninth Circuit issued its Opinion in Cause No. 94-30426 in which the United States Court of Appeals for the Ninth Circuit affirmed the Judgment and Conviction of Charles Roy Rambo. A copy of the Opinion is set forth in the Appendix as Exhibit "A". A timely Petition for Rehearing With Suggestion for Rehearing En Banc was filed on behalf of Mr. Rambo. By Order dated March 8, 1996, the Court denied the Petition for Rehearing and rejected the Suggestion for Rehearing En Banc. The Published Opinion of the United States Court of Appeals for the Ninth Circuit can now be cited as *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996).

BASIS FOR JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit in this case was entered on January 25, 1996. A timely Petition for Rehearing With Suggestion for Rehearing En Banc was denied and rejected by Order filed March 8, 1996. This Petition for Writ of Certiorari, which is sent to the

Clerk through the United States Postal Service by First Class Mail, Postage Pre-paid on April 24, 1996, is timely pursuant to Supreme Court Rule 13.1 and Supreme Court Rule 29.2.

The jurisdiction of this Court is conferred pursuant to 28 U.S.C. § 1254(1) to review on a Writ of Certiorari the Judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution:

Fourth Amendment --

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

18 U.S.C. § 922(o):

> "*(o)*(1) Except as provided in paragraph (2), it shall be unlawful for any

person to transfer or possess a machinegun.

(2) This subsection does not apply with respect to --

(A) a transfer to or by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or

(B) any lawful transfer or lawful possession of a machinegun that was lawfully possessed before the date this subsection takes effect."

STATEMENT OF THE CASE

A. Statement of the Facts

On February 25, 1993, the rural home of Charles Roy Rambo was burglarized. The burglary was committed by William Gregory Henman, a three time convicted felon. In the course of the burglary, Mr. Henman stole two VCR's and a black canvas bag, which Mr. Henman said he believed contained a telephoto camera lens. While leaving the residence,

Mr. Henman was confronted by Mr. James Morgan, the brother-in-law of Mr. Rambo and the only person home at the time of the burglary. Mr. Morgan was able to obtain the license plate number of Mr. Henman's vehicle and notified law enforcement.

When Deputy William Graf of the Musselshell County Sheriff's Department arrived at the Rambo residence, he was informed by Mr. Morgan that the burglar was seen going out of the Rambo residence with a black canvas bag under one arm and two VCR's under the other arm. As a result of the information provided by Mr. Morgan, Mr. Henman was stopped and arrested by a Montana Highway Patrol Officer. Mr. Morgan was then transported by Deputy Graf and Reserve Deputy Mike Thomas to the location where Mr. Henman was being detained, and Mr. Morgan identified Mr. Henman as the burglar. Mr. Rambo, who was returning home with his wife, mother-in-law, and sister-in-law from a doctor's appointment, happened to come upon the vehicles of Mr. Henman and law enforcement, and Mr. Rambo was stopped and informed of the burglary of his residence. Law enforcement then asked Mr. Rambo if he would follow them to Billings, Yellowstone County, Montana, because their assistance would be needed in order to identify the items stolen, and Mr. Rambo and his family complied.

Mr. Henman's vehicle was towed to the Yellowstone County Sheriff impound lot. Mr. Henman

was unwilling to consent to a search of his vehicle. However, Deputy Graf discovered that Mr. Henman was a previously convicted felon who was on parole. Mr. Randy Gowan, the parole officer of Mr. Henman with the Montana Parole and Probation Department, was contacted, and he authorized a search of Mr. Henman's property. No authority was obtained to search Mr. Rambo's property. After waiting for an hour in order to identify his property, Mr. Rambo was told that he could return home.

Musselshell County Deputy Graf and Reserve Deputy Thomas then conducted a search of Mr. Henman's vehicle in Yellowstone County at the Sheriff impound lot. During the course of his search, Deputy Graf discovered two VCR's and the black canvas bag which matched the earlier description he obtained from Mr. Morgan. Deputy Graf knew that the black canvas bag was the property of Mr. Rambo, not the property of Mr. Henman. Further, although the black canvas bag was partially unzipped at the top, Deputy Graf could see none of the contents inside. Deputy Graf then proceeded to open the black canvas bag at which time he then found the .45 caliber pistol which is the subject of the prosecution. At the same time, Deputy Graf also discovered inside the black canvas bag a flash suppressor which was determined to be a silencer as well as six clips of ammunition. Deputy Graf seized the black canvas bag and its contents together with a number of other items inside the vehicle of Mr. Henman. Deputy Graf prepared a receipt of the items

seized, but while he did include the two VCR's on the receipt, he failed to include the black canvas bag or any of its contents.

Deputy Graf and Reserve Deputy Thomas then traveled to the home of Musselshell County Sheriff Paul Smith to inform him of the pistol and alleged silencer which they had seized. While at the residence of Sheriff Smith, Sheriff Smith received a telephone call from the wife of Mr. Rambo, Joyce Rambo.

Mr. Rambo then spoke to Sheriff Smith. Mr. Rambo and his wife, who was listening in on the conversation, both testified that he asked Sheriff Smith if he could speak to him off the record, and Sheriff Smith said, "Yes, you can." Mr. Rambo then told Sheriff Smith that he had some concerns about the fact that not all of the registration paperwork had been completed regarding the firearm, and he was wondering what he should do. Mr. Rambo made no statements that the pistol was a machine gun or that he knew that the firearm was illegal.

Sheriff Smith, on the other hand, testified that when Mr. Rambo asked him if he could speak to Sheriff Smith off the record, Sheriff Smith informed him that it depended on what he wanted to discuss. According to Sheriff Smith, Mr. Rambo then admitted that the pistol stolen from his residence was a machine gun, and that he knew it was illegal.

On the following day, namely February 26, 1993, Sheriff Smith contacted Agent Don Flickinger of the Bureau of Alcohol, Tobacco and Firearms in Billings, Montana. Agent Flickinger allegedly instructed Sheriff Smith to fire three or four rounds of ammunition from the firearm to see if it fired fully automatic. Sheriff Smith was not instructed to test fire the alleged silencer. Deputy Graf and Undersheriff Les Osborne, who was off-duty at the time, as well as three to four other individuals, traveled out to their firing range. Neither Deputy Graf nor Undersheriff Osborne had any experience in test firing automatic firearms. The various individuals then fired four to six clips of ammunition or approximately 140 rounds. The firearm was also fired with the alleged silencer attached. Deputy Graf testified that he had fun firing the firearm, and that he was reprimanded for his conduct. Undersheriff Les Osborne stated, "I think we got carried away."

On April 22, 1993, an Indictment was filed in the United States District Court for the District of Montana charging Mr. Rambo with the offense of Possession of a Machinegun not registered to him in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. On July 21, 1993, a Superseding Indictment was filed charging Mr. Rambo in the same Indictment with Mr. Henman, the burglar of Mr. Rambo's residence. Mr. Rambo and Mr. Henman were charged in Count I with Possession of a Machinegun not registered to them in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871; in

Count II with Possession of a Silencer not registered to them in violation of 26 U.S.C. §§ 5841, 5861(d) and 5871; and in Count III with Possession of a Firearm with a partially obliterated serial number in violation of 26 U.S.C. §§ 5861(h) and 5871. In Count IV, Mr. Henman was charged by himself with Possession of a Firearm having been a previously convicted felon in violation of 18 U.S.C. § 922(g) and 924(a)(2). The United States Attorney moved the Court to dismiss the Indictment against Mr. Rambo without prejudice, and the District Court granted the motion. The Indictment as against Mr. Henman was also eventually dismissed.

On March 17, 1994, an Indictment (the third) was again filed in Cause No. CR 94-17-BLG-JDS charging Mr. Rambo with three specific violations, namely in Count I with Possession of a Machinegun in violation in 18 U.S.C. § 922(o)(1); in Count II with Possession of a Silencer not registered to him in violation of 26 U.S.C. § 5841, 5861(d) and 5871; and in Count III with Possession of a Firearm with a partially obliterated serial number in violation of 26 U.S.C. § 5861(h) and 5871. Mr. Rambo filed various pretrial motions, including a Motion to Suppress the evidence seized as a result of the search of the black canvas bag, and on August 29, 1994, the District Court issued its Order and Memorandum denying Mr. Rambo's pretrial motions.

On August 29, 1994, the jury trial began. Count III of the Indictment was dismissed upon motion

of the Assistant U.S. Attorney prior to the commencement of the trial. Of critical concern at the trial was the knowledge Mr. Rambo as to the functioning of the alleged machinegun and the alleged silencer.

At the trial of the case, Deputy Graf and Agent Flickinger both testified that a person cannot determine whether the pistol was a machine gun and fires fully automatically by simply an external examination of the firearm. Rather, the only method of making that determination is by test firing the firearm. Second, both Deputy Graf and Agent Flickinger testified that a person cannot tell whether the item described as a flash suppressor functions as a silencer by simply making an external examination of the item. Rather, the only way of determining whether the item functions as a silencer or not is by test firing the firearm with the silencer attached.

Mr. Rambo, who is 55 years of age, testified that he never fired the firearm or the alleged silencer during the 11 months between his purchase of the firearm and the burglary. In March of 1992, prior to moving to Montana, Mr. Rambo attended a gun show at the Fairgrounds in Louisville, Kentucky. While at the gun show, Mr. Rambo discussed a trade of firearms with a firearms dealer, namely Hayden Zohlman, Jr., with whom Mr. Rambo had made previous trades. It was the understanding of Mr. Rambo that the firearm was a legal semi-automatic weapon and the alleged

silencer was a legal flash suppressor. At the time of the trade, Mr. Rambo presumed that he completed all of the paperwork, but he was not sure. Further, he asked Mr. Zohlman for a copy of the paperwork, but Mr. Zohlman was not able to provide him with a copy at that time. Six days after the trade, Mr. Zohlman died. Although Mr. Rambo contacted Mr. Zohlman's wife to attempt to obtain copies of the transfer paperwork, he was not successful.

Mr. Rambo testified that following his purchase of the firearm, he was quite busy in completing the sale of his asphalt business which he had operated in Louisville, Kentucky, for approximately 19 years.

Mr. Rambo had become disgusted with the crime in the Louisville area, and it has always been a dream since he was a child to live out in the country in the West and have a little ranch.

In May of 1992, Mr. Rambo moved to Montana. Once he arrived in Montana, he spent most of the first six weeks doing some small renovation of the home which he had purchased as well as getting a space ready for a mobile home, including the laying of water pipe, electrical wiring, and a septic unit. Further, Mr. Rambo was also a substitute teacher at a rural school. In February of 1993, the burglary of Mr. Rambo's residence occurred. In the summer of 1993, Mr. Rambo enrolled in graduate classes at Eastern Montana College and obtained his Master's Degree in Education and

School Counselling. Both Joyce Rambo and James Morgan testified that they never saw or heard Mr. Rambo test fire the firearm in question. At any time through February 25, 1993, Mr. Rambo did not know that the firearm fired fully automatically and he did not know that the flash suppressor functioned as a silencer.

Nevertheless, on August 31, 1994, the jury returned a verdict of "guilty" as to Count I and Count II. On November 15, 1994, the District Court made a Downward Departure pursuant to the Federal Sentencing Guidelines from a total offense level of 20 to a total offense level of 10. The District Court then placed Mr. Rambo on probation for a term of 3 years. The reasons for the Downward Departure as cited by the Court was the fact that the conduct of Mr. Rambo was aberrant behavior; the weapon was purchased as a collector's item and not for any criminal purpose; and Mr. Rambo was the victim of a crime which ultimately led to his own conviction.

B. Jurisdiction in Court of First Instance

The basis for federal jurisdiction in the Court of First Instance, the United States District Court for the District of Montana, Billings Division, is the alleged violations of federal statutes, namely 18 U.S.C. § 922(o)(1) and 26 U.S.C. §§ 5841, 5861(d), 5861(h), and 5871.

ARGUMENT

Questions Presented for Review

1. Can the criminal actions of a third party reduce the legitimate expectation of privacy of Charles Roy Rambo for purposes of determining the reasonableness of the search and seizure of the black canvas bag?

In his direct appeal to the United States Court of Appeals for the Ninth Circuit, Charles Roy Rambo challenged the reasonableness of the warrantless search of his black canvas bag upon the grounds that the search and seizure of the interior of the black canvas bag constituted a violation of Mr. Rambo's Fourth Amendment right to be free from unreasonable searches and seizures. In response to Mr. Rambo's challenge, the Court stated at 74 F.3d at 952:

> "The District Court determined that Rambo had no legitimate expectation of privacy in the bag after it was stolen and, even if he did, the search of the bag was reasonable under the Fourth Amendment. On appeal, the United States does not argue that Rambo lacked a legitimate expectation of privacy in the bag. Notwithstanding that concession, the United States still contends that the search was constitutional. Rambo, of course, did

not consent to the search of his bag, so we must determine whether Deputy Graf's search of constitutionally protected property was reasonable.

> The Fourth Amendment proscribes unreasonable searches. As a general rule, searches conducted without a warrant and probable cause are presumptively unreasonable, subject to a number of 'specifically established and well-delineated' exceptions. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). *But see United States v. Barona*, 56 F.3d 1087, 1092 n. 1 (9th Cir. 1995) ('[r]easonableness, not probable cause, is undoubtedly the touchstone of the Fourth Amendment.') One such exception is the so-called automobile exception. California v. Acevedo, 500 U.S. 565, 566 (1991). Under this doctrine, as developed by the Supreme Court in United States v. Ross, 456 U.S. 798 (1982) and Acevedo, '[t]he police may search an automobile and the containers within it [without a warrant] where they have probable cause to believe contraband or evidence is contained.' 500 U.S. at 580.

Deputy Graf's concededly proper

> search of Henman's vehicle revealed the presence of stolen property including Rambo's VCRs and black canvas bag. Deputy Graf had ample probable cause to believe that the missing jewelry might be in the bag. Under Acevedo, it was completely reasonable for Graf to search the bag to look for the jewelry; indeed he found the jewelry there. No warrant or consent was required. Once Graf had legitimately searched the bag, the seizure of the firearm and silencer was justified under the plain view doctrine. See Horton v. California, 496 U.S. 128, 133-34 (1990)."

Admittedly, one could view the Petition in this case as simply another search and seizure decision involving a very unusual set of circumstances. However, to do so would ignore the enormous impact that this case has upon a fundamental concept of search and seizure jurisprudence, namely the legitimate expectation of privacy. Here, the decision of the United States Court of Appeals for the Ninth Circuit effectively utilized a diminished expectation of privacy when the Court applied the "automobile exception" in determining the reasonableness of the search. However, Mr. Rambo took no action on his part which evidenced an intent to reduce or waive his expectation of privacy in the contents of the black canvas bag ordinarily stored within his residence. Rather, the Court utilized a

diminished expectation of privacy which was not the result of voluntary actions on the part of Mr. Rambo, but the result of criminal actions on the part of the burglar, Mr. Henman. In other words, the Court treated Mr. Rambo's expectation of privacy as one in which he voluntarily took to the highways of Montana and engaged in further conduct which justified the stopping of his vehicle. Such a decision has a direct impact upon the decision of this Court in *Katz v. United States*, 389 U.S. 347 (1967) and its progeny.

The Fourth Amendment "protects people from unreasonable Government intrusions into their legitimate expectations of privacy." See *United States v. Chadwick*, 433 U.S. 1 (1977). Three principles guide the inquiry of whether one has a legitimate expectation of privacy. First, "the Fourth Amendment protects people, not places." See *Katz* at 351. Second, a privacy interest, in the constitutional sense, consists of a reasonable expectation that uninvited and unauthorized persons will not intrude into a particular area. One may freely admit guests of one's choosing -- or be legally obliged to admit specific persons -- without sacrificing one's right to expect that a space will remain secure against all others. See *Stoner v. California*, 376 U.S. 483, 489-90 (1964) and *Chapman v. United States*, 365 U.S. 610, 616-17 (1961). Third, an expectation of privacy, strictly speaking, consists of a belief that uninvited people will not intrude in a particular way. A person may renounce the assumption that he is immune from one kind of invasion while

retaining the belief that he is protected from others; by exposing one's self to public view, for instance, one does not relinquish one's right not to be overheard. See *Katz* at 352.

Over the years, as the relationship between legitimate expectation of privacy and warrantless searches and seizures has been defined, the most critical factor has been the diminished or relinquished expectation of privacy resulting from the person's voluntary conduct. Such examples are as follows:

1. A person placing an item in a motor vehicle, and then driving the vehicle upon the public thoroughfares -- See *California v. Acevedo*, 500 U.S. 565 (1991) and *Cardwell v. Lewis*, 417 U.S. 583 (1974).

2. A person placing an article in plain view for all to see -- See *Collidge v. New Hampshire*, 403 U.S. 443 (1971).

3. A person abandons his property -- See *Abel v. United States*, 362 U.S. 217 (1960).

4. A person consents to a search of his property, thereby waiving his expectation of privacy -- See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

5. A person places an item in their garbage at the curb -- See *California v. Greenwood*, 486 U.S.

35 (1988).

In each of the above listed examples, no search warrant is required. Further, in each of the above stated examples, the voluntary actions of each person evidences a diminished expectation of privacy or a waiver and relinquishment of his expectation of privacy. Here, Mr. Rambo took no action which evidenced a diminished expectation of privacy or a waiver of his expectation of privacy in the black canvas bag. To find that the warrantless search of the black canvas bag was reasonable based upon a diminished expectation of privacy on the part of Mr. Rambo is in direct conflict with this Court's decision in *Katz v. United States* and its progeny.

2. Whether 18 U.S.C. § 922(o) constitutes a proper exercise of the authority granted to Congress under the Commerce Clause in light of *United States v. Lopez*, 115 S.Ct. 1624 (1995)?

In *Lopez*, a twelfth grade student carried a concealed handgun and five bullets into his high school. Acting upon an anonymous tip, he was arrested and charged under Texas law with firearm possession on school premises. The following day, the State charges were dismissed after Federal agents charged Mr. Lopez by Complaint with violating the Gun-free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A).

Mr. Lopez moved to dismiss his Federal Indictment on the ground that § 922(q) is unconstitutional as it is beyond the power of Congress to legislate control over our public schools. The District Court denied the motion, and Mr. Lopez was eventually convicted of violating § 922(q). On appeal, Mr. Lopez challenged his conviction again based on his claim that § 922(q) exceeded Congress' power to legislate under the Commerce Clause. The United States Court of Appeals for the Fifth Circuit agreed and reversed his conviction. See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993). The Supreme Court of the United States granted *certiorari* and affirmed the judgment of the Court of Appeals.

Chief Justice Rehnquist delivered the opinion of the Court, and began by discussing the history of the Commerce Clause and the Court's interpretation over the years of the Commerce Clause -- a necessary discussion in order to place *Lopez* in the proper context. Following this thorough review, the Court at 131 L.Ed.2d 637 set forth the applicable test and stated:

> **[2a]** Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. *Perez v. United States, supra,* at 150, 28 L.Ed.2d 686, 91 S.Ct. 1357; see also *Hodel v. Virginia Surface Mining & Reclamation Assn., supra,* at 276-277, 276-280, 69

L.Ed.2d 1, 101 S.Ct. 2352. First, Congress may regulate the use of the channels of interstate commerce. See, *e.g.*, *Darby*, 312 US, at 114, 85 L.Ed. 609, 61 S.Ct. 451, 132 ALR 1430; *Heart of Atlanta Motel, supra,* at 256, 13 L.Ed.2d 258, 85 S.Ct. 348 ("'[T]he authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question.'" (quoting *Caminetti v. United States*, 242 US 470, 491, 61 L.Ed. 442, 37 S.Ct. 192 (1917)). Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. See, *e.g., Shreveport Rate Cases*, 234 US 342 (1914); *Southern R. Co. v. United States,* 222 US 20, 56 L.Ed. 72, 32 S.Ct. 2 (1911) (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra*, at 150, 28 L.Ed.2d 686, 91 S.Ct. 1357 ("[F]or example, the destruction of an aircraft (18 U.S.C. § 32 [18 USCS § 32]), or . . . thefts from interstate shipments (18 U.S.C. § 659 [18 USCS §659])"). Finally, Congress' commerce authority

> includes the power to regulate those activities having a substantial relation to interstate commerce, *Jones & Laughlin Steel*, 301 US, at 37, 81 L.Ed. 893, 57 S.Ct. 615, *i.e.*, those activities that substantially affect interstate commerce. *Wirtz, supra*, at 196, n 27, 20 L.Ed.2d 1020 , 88 S.Ct. 2017.
>
> Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the Commerce Clause. Compare *Preseault v. ICC*, 494 US 1, 17, 108 L.Ed.2d 1, 110 S.Ct. 914 (1990), with *Wirtz, supra*, at 196, n 27, 20 L.Ed.2d 1020, 88 S.Ct. 2017 (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce."

Since the *Lopez* decision, three opinions have been rendered by the United States Courts of Appeals in the following cases:

1. *United States v. Wilks*, 58 F.3d 1518 (10th Cir. 1995);

2. *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995); and

3. *United States v. Rambo*, 74 F.3d 948 (9th Cir. 1996).

Although each of the three opinions upheld the constitutionality of § 922(o) as a proper exercise of authority under the Commerce Clause, much of the consistency and reliability of the three opinions ends there. It is appropriate, therefore, to review each of these three decisions.

In *Wilks*, the Court did review the three categories of activity that Congress can regulate or protect under the Commerce Clause. The Court then determined that § 922(o) embodies a proper exercise of Congress' power to regulate "things in interstate commerce", namely machineguns, and found that the interstate flow of machineguns not only has a substantial effect on interstate commerce, it is interstate commerce. As a result, *Wilks* found that the activity to be regulated fell within the second and third categories of activity.

In *Kirk*, the Court cited with approval the *Wilks* decision that § 922 embodies a proper exercise of

Congress' power to regulate things in interstate commerce and that the interstate flow of machineguns has a substantial effect on interstate commerce. Additionally, the Court went on to conclude at page 796 of its Opinion that § 922(o) also falls into the first category identified by the Supreme Court in *Lopez*, namely a regulation of the use of the channels of interstate commerce. However, there is a question as to the reliability of the *Kirk* decision in light of the fact that the United States Court of Appeals for the Fifth Circuit has apparently agreed to a Rehearing En Banc. As a consequence of the Court's decision, the vitality and reliability of the decision of the United States District Court for the Southern District of Mississippi in *United States v. Bownds*, 860 F.Supp. 336 (1994), a decision within the Fifth Circuit, must be considered. In *Bownds*, the Court held that § 922(o) was unconstitutional in that the statute violated the Tenth Amendment and Congress made no findings, explicit or implied, to support its authority to ban the mere possession of machineguns, such as an interstate nexus.

Finally, in *Rambo*, the United States Court of Appeals for the Ninth Circuit, relying in part upon *Kirk*, concluded that § 922(o) comes within the first category of activity enumerated by the Supreme Court in *Lopez*, namely the use of the channels of interstate commerce. Interestingly, the Court did not discuss whether machineguns were "things in interstate commerce" or whether there was a "substantial relation

to interstate commerce."

In light of this discussion, there is, indeed, a serious question as to whether there exists conflict or uniformity among the Circuits as to the constitutionality of § 922(o). In light of this question, it is appropriate to review § 922(o) in light of *Lopez*.

As did the Court in *Lopez*, one must "turn to consider the power of Congress, in light of this framework, to enact" § 922(o) which provides:

> "*(o)*(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machinegun.
>
> (2) This subsection does not apply with respect to --
>
> (A) a transfer to *or* by, or possession by or under the authority of, the United States or any department or agency thereof or a State, or a department, agency, or political subdivision thereof; or
>
> (B) any lawful transfer or lawful possession of a machinegun that was

> lawfully possessed before the date this subsection takes effect."

As in *Lopez*, the first category of authority should be quickly disposed of in that § 922(o) "is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce ..." This should be undisputed in that this is not the type of "channels" contemplated by *Lopez*.

The second category of authority is equally inapplicable. In *Lopez*, the Court again found at page 637 of its opinion that ... "nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce." Correspondingly, just as the Court in *Lopez* found that the firearm was not "an instrumentality of interstate commerce or a thing in interstate commerce", the machinegun in this case is also not "an instrumentality of interstate commerce or a thing in interstate commerce." This is particularly evident due to the fact that the statute makes no mention of a requirement that the firearm has been, at some time, in interstate commerce. See *United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988) and *United States v. Hanna*, 55 F.3d 1456 (9th Cir. 1995).

If simple possession of a firearm is not a "thing in interstate commerce", then it is illogical to conclude

that simple possession of a machinegun becomes a "thing in interstate commerce" by the mere fact that it fires automatically. When the *Lopez* decision is honestly analyzed, § 922(o) cannot be justified as a regulation by which Congress has sought to protect a thing in interstate commerce.

Consequently, just as in *Lopez*, if § 922(o) is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce. In discussing this third category, the Court in *Lopez* noted that the Court has upheld a wide variety of congressional acts regulating intrastate economic activity where the Court has concluded that the activity substantially affected interstate commerce. In discussing these congressional acts and § 922(q), the Court in *Lopez* stated at page 638:

> "Sec. 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms. § 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in

> the aggregate, substantially affects interstate commerce."

Here, § 922(o) "by its terms has nothing to do with 'commerce' or any sort of economic enterprise ..." Further, § 922(o) is not an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated. Therefore, § 922(o) cannot be sustained on the basis of those cases previously described.

A second possible basis upon which to sustain § 922(o) under the third category is if it contains a jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affect interstate commerce. See *Lopez* at page 639. In *Lopez*, the Court found that § 922(q) had no express jurisdictional element which might limit its reach to a discreet set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Here, § 922(o) contains no such jurisdictional element. In fact, § 922(o) makes no mention whatsoever of the terms "commerce" or "interstate commerce." It is precisely this lack of a jurisdictional element which dealt the fatal blow to § 922(q) in *Lopez*. Consequently, the third category cannot be sustained as authority for § 922(o).

Finally, in *Lopez*, as a part of the Court's

independent evaluation of constitutionality under the Commerce Clause, the Court considered legislative findings, and even congressional committee findings, regarding effect on interstate commerce. In *Lopez*, the Government conceded that neither the statute nor its legislative history contained express congressional findings regarding the effects upon interstate commerce of gun possession in a school zone. Correspondingly, as to § 922(o), there was no committee report, and sparse legislative history concerning § 922(o), as it was added on the House floor. The only apparent explanation for it is the statement of its sponsor, Representative Hughes, that "I do not know why anyone would object to the banning of machineguns." See *United States v. Lopez*, 2 F.3d 1342, 1356 (5th Cir. 1993).

While the Supreme Court of the United States attempted to make findings as to effects upon interstate commerce of gun possession in a school zone, the Court found that they were lacking. The Court then addressed the various arguments raised by the Government in support of its contention that interstate commerce was not substantially affected, and specifically addressed one of the arguments in *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991). The arguments advocated by the Government in *Lopez* are no more applicable to the case of Mr. Rambo. In fact, Mr. Rambo's alleged possession of the machinegun was for collecting purposes and was not for any other purpose. Mr. Rambo's simple possession has no more effect upon

interstate commerce than did the simple possession of a firearm by Mr. Lopez within the school zone. The third category of regulation cannot be sustained as authority for § 922(o). Therefore, 18 U.S.C. § 922(o) is not a proper exercise of authority granted to Congress under the Commerce Clause. Section 922(o) is unconstitutional.

CONCLUSION

For the reasons stated and the authorities cited, the Petitioner, Charles Roy Rambo, respectfully requests that this Honorable Court grant his Petition for Writ of Certiorari.

DONE AND DATED this 24th day of April, 1996.

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